Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 102 (and No. 88).

THE NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM S. ELY, MARVIN ARNOLD, JULIA ARNOLD, *et al.*

STATEMENT.

This suit was begun by the Northern Pacific Railway Company in the Superior Court of Spokane County, a court of the State of Washington of original jurisdiction. Its purpose was, to determine the title to, and recover, what the plaintiff alleged was a part of its right of way granted by section 2 of the act of Congress of July 2, 1864. The complaint alleged title to the premises in dispute by virtue of the act of Congress (Transcript pp. 3-7); that the railroad was located and constructed in ac-

cordance with the terms of the act; that the lands in dispute were public lands of the United States free from claims when the grant was made, and that the lands were within two hundred feet of the located and constructed track (Transcript, pp. 7-8).

Defendants divided in their answers, several separate answers being filed. They will be found at Transcript pp. 10 to 64.

Separate trials were had on the different answers, some before juries, one before the court without a jury. In the jury trials verdicts were returned for the defendants below (Transcript pp. 84-88); and in the trial by the court there was a finding of facts (Transcript p. 91).

Judgment was entered against the plaintiff in error upon the verdicts and upon the finding of the court (Transcript pp. 96-104). This judgment was affirmed by the supreme court of Washington (Transcript pp. 127-135) and the judgment of that court is brought here by writ of error.

A bill of exceptions preserves the evidence and exceptions upon the trials (Transcript pp. 111-127), and that, with the finding upon trial of the William S. Ely answer (Transcript p. 91), is the record of the facts.

The bill of exceptions shows that upon the trials each of the defendants admitted the incorporation of the Northern Pacific Railroad Company by the act of Congress of July 2, 1864; and admitted that the act was accepted by the company; that in accordance with its provisions the company located and constructed its railroad and filed its map of

definite location of that part of the line crossing the premises in controversy on the 4th day of October, 1880; that the line was duly constructed over the premises, which were on July 2, 1864, free public lands of the United States, upon the located line; that plaintiff in error is a corporation under the laws of Wisconsin (Transcript pp. 111-112).

Plaintiff in error proved that the premises were within two hundred feet of the railroad, which had been continuously operated since 1881 (Transcript p. 112).

Plaintiff in error proved its successorship to the *federal corporation* by evidence which was objected to by only two of the defendants; their objections are stated in the record and we apprehend will not be urged here (Transcript p. 112).

The ground upon which the title derived by plaintiff in error from the act of Congress was defeated, as well as the federal question which gives this court jurisdiction to review the judgment of the state court, is best shown by the following extract from the bill of exceptions (Transcript p. 126):

> "Plaintiff thereupon, upon each separate trial and as to each of said defendants, requested the court to rule and hold as a matter of law that the premises in question, being a part of the right of way of the plaintiff granted to its predecessor, Northern Pacific Railroad Company, by act of Congress approved July 2, 1864, or any part thereof, could not be aliened or disposed of by such grantee or its successors in title, and that consequently such right of way, or any part thereof, could not be acquired by adverse occupation under State statutes; also that Congress in said act conclusive-

ly determined the width of right of way necessary for the use of the Government grantee.

Plaintiff placed its alleged title distinctly upon the construction, scope and effect to be given to said act of Congress and claimed a title derived under said act.

But on each of said separate trials, the court having duly considered the said questions, refused to so rule or hold, and held that title to the lands in controversy—a part of said right of way—could be obtained by adverse possession or abandonment, and all evidence introduced by each and every of the defendants on the subject of adverse possession or abandonment was introduced and received by the court over the objections of plaintiff to each and every of which rulings of the court plaintiff then and there duly excepted, which exceptions were duly allowed."

As thus shown, the State court held that the title to the right of way or some part of it, granted the Northern Pacific Railroad Company by the act of Congress of July 2, 1864, could be taken from it by adverse possession or abandonment, and this is the proposition brought here for review.

It is not profitable to state the particular evidence, which each defendant in error offered as to his parcel, showing possession in him or his grantors and acts of acquiescence of the Railroad and Railway Companies tending to show a voluntary abandonment of the premises. The brief facts are, that the lands in suit lay within several forty acre tracts which were entered by different people at different times, as stated in the bill of exceptions, between the years 1879 and 1884. The Railroad

Company did not fence or otherwise actually occupy its right of way to the full width. Plats were filed by grantors of defendants in error which encroached upon the Railroad's 400 foot strip, and lots and parcels within the encroachment were sold to different people (either defendants in error or their grantors) who went into possession. We freely concede, and the bill of exceptions shows beyond controversy, that the premises in question, or most thereof, are actually occupied and have been for some years, the time of occupation varying as to different parcels as shown in the record, and that portions of the premises have substantial improvements. That these improvements must have been made—at least to some extent—with the knowledge of the agents and officers of the Northern Pacific Railroad Company, is we think self evident and must also be admitted. The facts, moreover, confessedly suggest that some at least of the officers and agents of the Northern Pacific Railroad Company, the federal corporation, must have supposed that the company had no title to the premises. These admissions, we think, concede all the facts that the defendants in error can assert. There is no proof or suggestion that the Railroad Company or the Railway Company has ever executed a conveyance of any part of the premises, and therefore the case is unaffected by the act of Congress of April 28, 1904. The statement of the evidence of adverse possession and acquiescence of the Railroad and Railway Companies is contained in pages 112 to 126 Transcript.

Assignment of Errors.

Errors are properly assigned (Transcript p. 137). They are summed up in one proposition, to-wit: that the court erred in holding that the premises in suit, being right of way granted by the act of Congress of July 2, 1864, were lost to the plaintiff in error by adverse possession, or by abandonment and acquiescence in the occupation and improvement of the defendants in error.

Argument.

We regard every question which can be suggested upon this record as settled by *Northern Pacific Railway Co. v. Townsend*, 190 U. S. 267, decided since the state court rendered its judgment in this suit. We submit that the judgment below must be reversed upon the authority of the *Townsend* case.

One suggestion is perhaps called for in view of the opening sentence of the opinion in that case. It is there said:

> "As the grant of the right of way, the filing of the map of definite location, and the construction of the railroad within the quarter section in question preceded the filing of the homestead entries on such section, the land forming the right of way therein was taken out of the category of public lands subject to preemption and sale."

In the case at bar, it is true only as to a portion of the lands, that the filing of the map of definite location and the construction of the railroad antedated the private entry. But this court has in two

cases decided, after thorough consideration, that *the right of way grant* in acts of Congress like the Northern Pacific grant, *unlike the land grant*, is effective from the *date of the act*, and the only question is, whether the land was public land at that date. *Railroad Company v. Baldwin*, 103 U. S. 426; *Bybee v. Oregon & California Railroad Co.*, 139 U. S. 663, 679-680.

The court's attention should be called to a question of practice. Two writs of error were sued out; one is No. 102, the other No. 88 of the present docket. In No. 88 the petition for the writ refers to a judgment of the supreme court of Washington entered on the "29th day of June." This date was that of the filing of the court's opinion; but the judgment was entered July 30; so a new writ was sued out, No. 102, upon a petition describing the judgment as entered on the "30th day of July, 1901."

Plainly, if the first writ of error No. 88 is regular and brings up the judgment, the second No. 102 should be dismissed. The same would be true if the petition in No. 88 were amended so as to state the date of the judgment correctly. But if the writ in No. 88 does not bring up the judgment and the petition is not amended, No. 102 is properly before the court.

Plaintiff in error therefore moved the court in the alternative, either for an order amending the

petition for writ in No. 88 so as to state the correct date of the judgment below, or an order dismissing the writ of error in that case. At the last term (October 19, 1903) the court postponed action on the motion until the cases were reached to be heard on the merits. We refer the court to the brief filed on the motion.

Counsel have filed a stipulation that the record in No. 88 need not be printed and that both cases may be heard on the record in No. 102.

C. W. BUNN and
JAMES B. KERR,
for Plaintiff in Error.